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No. 99-1453

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC., *et al.*,

Petitioners,

v.

THE COUNTY OF MONTEREY, CALIFORNIA, and the COUNTY OF SAN MATEO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is possession of information by the United States Government a condition precedent for the application of 31 U.S.C. § 3730(e), the "public disclosure" bar of the Federal False Claims Act?

Petitioner argued the first Question Presented in the District Court, but abandoned it in the Ninth Circuit Court of Appeals.

2. May Defendant(s) raise the public disclosure bar after the Attorney General has investigated the qui tam plaintiff's case, declined to intervene and filed no other motion on behalf of the United States?

Petitioner never raised the second Question Presented in the courts below and neither the District Court nor the Ninth Circuit addressed it.

PARTIES TO THE PROCEEDINGS

The parties are as set forth in the Petition.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondents provide the following disclosures:

Baystar Medical Services was a d/b/a for Solano Ambulance Co., Inc. ("Solano"). Solano was a California corporation and on August 29, 1996, Solano was merged into Laidlaw Medical Transportation, Inc. ("LMT"). LMT is a Delaware corporation and a wholly-owned subsidiary of American Medical Response, Inc. ("AMR"). AMR is a Delaware corporation and a wholly owned subsidiary of Laidlaw Transit, Inc. a Delaware corporation, which is a wholly-owned, indirect subsidiary of Laidlaw Inc., a Canadian corporation which is publicly traded.

Peninsula Paramedic Services, Inc., ("Peninsula") was a California corporation and a wholly-owned subsidiary of Laidlaw Medical Transit, Inc. On September 7, 1999 it was merged into American Medical Response West ("AMR West"). AMR West is a California corporation and a wholly-owned subsidiary of American Medical Response, Inc., which is a wholly owned subsidiary of Laidlaw Transit, Inc. a Delaware corporation, which is a wholly-owned, indirect subsidiary of Laidlaw Inc., a Canadian corporation which is publicly traded.

Respondents County of Monterey and County of San Mateo are both political subdivisions of the State of California.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This case is one of a series of lawsuits brought by A-1 Ambulance Service, Inc., against the County of Monterey, California over the past 15 years. *See, A-1 Ambulance Service, Inc. v. Robert J. Melton, M.D., M.P.H., the County of Monterey, California, et al.*, U.S. Supreme Court Case No. 99-1217, Petition for Writ of Certiorari, pages 5-6 (two other lawsuits by A-1 against Monterey County during that period of time are not mentioned in the petition in the A-1 v. Melton case).

A-1 is owned by Eugene Dong, M.D., who, as a lawyer admitted to the state bar, is acting as A-1's attorney in this case. Prior to January 1, 1996, A-1 was a provider of emergency ambulance services in Monterey County. In 1995, Monterey County initiated a competitive bidding process to select a single ambulance provider to serve both the territory then served by A-1 as well as additional territories throughout the county. A-1 participated as a bidder in the process, but was unsuccessful. The contract was awarded to Peninsula Paramedic Services ("Pen Med"), which replaced A-1 on January 1, 1996. Pen Med was later acquired by American Medical Response ("AMR"), and is a named defendant in the present case.

Through A-1's participation as a service provider and as a bidder in the Monterey County public bidding process, Dr. Dong came to know about certain facts that made him believe that Monterey County and Monterey County's new ambulance provider were conspiring to defraud the federal medical assistance program known as

Medicare. A-1, through Dr. Dong, understood that Medicare set the rates that it would pay for ambulance services based on ambulance rates that were commonly charged in the local area. A-1 further noted that in Monterey County, as in other counties of the state, the state medical assistance program for eligible needy persons ("Medi-Cal" – *see* California Welfare and Institutions Code §§ 14000 *et seq.*) and the county medical assistance program for other needy persons ("general assistance" – *see* California Welfare and Institutions Code §§ 17000 *et seq.*) paid very low rates for ambulance services – far lower than the prevailing commercial rates, prevailing insurance rates, and Medicare rates.

Medicare regulations specifically contemplate that in setting Medicare rates, the government will disregard "token charges for charity patients and substandard charges for welfare and other low income patients." 42 C.F.R. § 405.503(a). *See* also 42 C.F.R. §§ 405.501, 405.502, 405.504, and 405.509. Nevertheless, A-1 saw in the Monterey County facts recited above some sort of a conspiracy to defraud Medicare by setting ambulance rates at a high level so as to subsidize the transport of charity, welfare and other low income patients, for whom government assistance payments would be meager.

A-1 also became aware, through Dr. Dong's participation in ambulance business affairs in other counties in California, that the circumstances in nearby San Mateo County resembled those in Monterey County, and A-1 thought they had found in San Mateo County the same sort of fraudulent schemes as they thought existed in Monterey County. Therefore, A-1 also named San Mateo

County and its ambulance provider (Baystar Ambulance, also a subsidiary of AMR) as defendants in this case.

STATEMENT OF THE CASE

A-1's Statement of the Case is reasonably accurate, although not completely so. In addition, A-1 fails to mention a number of key pieces of information.

With regard to the proceedings below, A-1 does not give a completely accurate picture of the issues that were raised and decided. Following A-1's service of its First Amended Complaint, the defendants moved the court for dismissal, based on the public disclosure provisions of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). A-1 filed its memorandum of points and authorities in opposition to this motion. A-1's principal argument in its points and authorities was that the jurisdictional bar to *qui tam* actions under the False Claims Act required that the federal government must be in possession of the relevant information, before the bar may be raised. In making this argument, A-1 relied on *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 117 S.Ct. 1871 (1997), as it does in the instant petition. A-1 also argued that the information had not been publicly disclosed. A-1 did not make any argument to the District Court, in its points and authorities or orally before the court, to the effect that the defendants were prevented from raising the public disclosure bar after the Attorney General had investigated the *qui tam* plaintiffs' case, declined to intervene and filed no other motion on behalf of the United States.

Over A-1's objections, the U.S. District Court granted the motion to dismiss. A-1 appealed to the Ninth Circuit Court of Appeals. In its appeal brief, A-1 abandoned its argument that the jurisdictional bar applied only to lawsuits that were based on information that was already in the government's possession. A-1 described the legislative history of the False Claims Act jurisdictional bar (Appellant's Opening Brief in Ninth Circuit, pages 18-22). A-1 noted that prior to 1986, the jurisdictional bar applied to cases where a *qui tam* action was based on information that was already in the federal government's possession. A-1 noted that in 1986, the Act was amended, and that in those amendments, "Congress replaced the government knowledge bar with what has become known as the public disclosure bar. . . . " (A-1's Opening Brief, page 22). Thereafter, A-1 made no mention of the arguments it had made to the District Court that the information must be in the possession of the federal government before the jurisdictional bar will apply. A-1 also did not repeat in the Ninth Circuit Court of Appeals the argument it had made on this subject to the District Court under *Hughes Aircraft*.

However, A-1 then argued in its brief to the Ninth Circuit that the public disclosure bar applied only when the public disclosure was made in a federal government forum. A-1 argued that the public disclosure had to be made in one of the fora listed in Section 3730(e)(4)(A) and that these fora had to be federal government fora. A-1 further argued:

> "Congress intended the public disclosure bar to attach only when there has been a public disclosure of allegations *by the federal government*

> through one of the enumerated means. Appellees cannot allege that the disclosures were made through a federal government means or proceeding because there is no evidence in the record the federal government was even aware of these allegations."

See Appellants' Opening Brief to Ninth Circuit, page 23 (emphasis added).

Thus, in an indirect way, and despite its acknowledgement that Congress had eliminated the "government knowledge" bar, A-1 tried to put back into the Act's interpretation the requirement that the government have knowledge of the information upon which the suit is based, before the jurisdictional bar would apply.

In all of A-1's briefs to the Ninth Circuit, A-1 made no argument to the effect that the defendants were prevented from raising the public disclosure bar after the Attorney General had investigated the *qui tam* plaintiffs' case, declined to intervene and filed no other motion on behalf of the United States.

Finally, in its Petition to this court, A-1 has abandoned the argument it made to the Court of Appeals for the Ninth Circuit and has reverted to the argument it made to the District Court but abandoned in the Court of Appeals. A-1 now openly claims that the jurisdictional bar applies only in those cases where the information upon which the action is based is already in the government's possession at the time the action is commenced.

In addition, A-1's Statement of the Case is seriously defective in that it fails to point out that all of the Monterey County documents quoted by A-1 as evidence of the

alleged fraudulent conspiracy in that Statement of the Case, and all of the Monterey County documents that are attached as Appendices to A-1's Petition for Writ of Certiorari, were documents that were presented in public to the Monterey County Board of Supervisors before the Board of Supervisors made its decision to award the ambulance bid to Pen Med in 1995.

Further, A-1 is simply wrong when it says, on page 5 of its Statement of the Case, that "Respondent Monterey did not disclose the reimbursement standard for county Medically Indigent Adults ('MIA') patients receiving ALS services." Monterey did in fact disclose that information – it was a matter of public record, actually known to A-1 and the other ambulance providers who had provided ambulance services in the County, and available to all other ambulance providers. The RFP made it plain that transports of these patients would be included in the bid.

A-1 is also incorrect when it asserts simply, on page 3 of its Statement of the Case, that Monterey County "required that all proposers 'agree to accept assignment from Medicare and Medi-Cal." *See* Appendix D, page 30a to A-1's Petition for Writ of Certiorari, which includes the applicable paragraph from the RFP, as follows:

> "All proposers must agree to accept assignment from Medicare and Medi-Cal **or have an acceptable alternative plan for handling hardship cases.** Any alternative proposal must state and document historical experience to achieve the goal that no hardship will occur to the elderly or infirm or incapacitated who are unable to pay their deductibles or copays."

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO POSSESS INFORMATION CONCERNING A FRAUD, BUT BARS CLAIMS BASED ON "PUBLIC DISCLOSURE" OF THE "ALLEGATIONS OR TRANSACTIONS" GIVING RISE TO THE CLAIM

Petitioner's first argument for considering the Petition for Writ of Certiorari is that the 1986 amendment to the False Claims Act, specifically 31 U.S.C. § 3730(e)(4)(A), requires that the federal government actually possess information about an alleged fraud before the "public disclosure" bar of that section can be triggered.

Petitioner cites to no authority, other than its misreading of this Court's decision in *Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871 (1997), for this proposition. This argument ignores the history of the *qui tam* provisions of the False Claims Act and is directly contrary to the statutory framework adopted in 1986. The Petition should be denied.

A. The 1986 Amendment Replaced A Scheme Under Which Government Knowledge Was A Bar To A *Qui Tam* Action.

The history of the *qui tam* provisions of the False Claims Act has been set forth in numerous Court of Appeals decisions, and was discussed, in part, by this Court in *Hughes*, *see* 520 U.S. at 945-946. The statute has

been amended several times in response to judicial interpretation.

In 1943, this Court held, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379 (1943), that the Act as then written did not require a relator to bring any original information to his *qui tam* action, and the relator could rely entirely on allegations and information developed by the government itself.

In response, Congress passed a provision, 31 U.S.C. § 3730(b)(4) (1985 ed.) (repealed), which required a federal district court to "dismiss [a qui tam] action . . . based on evidence or information the government had when the action was brought." This provision was eventually construed to require dismissal of an action even where the relator was the one who brought the information to the government, because the government had that information at the time the action was commenced. *See, e.g., United States ex rel. State of Wisconsin v. Dean*, 729 F.2d. 1100, 1104 (7th Cir. 1984).

As a result of the backlash to this construction, Congress undertook a major overhaul of the statute in 1986, adopting an entirely new statutory scheme. One of the new provisions was Section 3730(e)(4)(A). The section provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media unless the action is brought by the Attorney General or the

person bringing the action is an original source of the information.

No longer was the focus on whether or not the government possessed information concerning the alleged fraud. Rather, the focus was now on whether the "allegations or transactions" of fraud had been the subject of "public disclosure" prior to the commencement of the *qui tam* action. If they had been, the district court would only have subject matter jurisdiction of the action if the relator was "an original source of the information." *See* 31 U.S.C. § 3730(e)(4)(A).

B. This Court's Ruling In *Hughes Aircraft* Did Not Hold That The Federal Government Must Possess Information Concerning A Fraud To Trigger The "Public Disclosure" Bar And There Is No Conflict Between *Hughes Aircraft* And The Ninth Circuit Decision In This Case

Petitioner bases its entire argument on one paragraph of this Court's opinion in *Hughes Aircraft*, 520 U.S. at 946, 117 S.Ct. at 1876.

One of the undisputed facts in *Hughes Aircraft* was that the federal government was in possession of information concerning the alleged fraud before the action was commenced. Petitioner seems to think that this fact is enough to support its argument in the present case. However, the issue in *Hughes Aircraft* was not whether the government's possession of information was a necessary condition to application of the "public disclosure" provision of the 1986 Amendment to the FCA.

The issue in *Hughes Aircraft* was whether the 1986 amendment could be retroactively applied to allow a *qui tam* action based on alleged wrongs committed before the amendment took effect. This court noted that, if the old law applied, the undisputed fact that the government already possessed the information would bar the *qui tam* action. On the other hand, if the 1986 law applied, the fact that the government already possessed the information would not bar the relator's *qui tam* action; rather, under the new law, the action would be barred only if (a) the action was based on information that had already been publicly disclosed in an appropriate forum and (b) the relator bringing the action was not an original source for the information. Two paragraphs of this Court's opinion summarize the holding in *Hughes Aircraft*, but Petitioner cites only the second one:

> The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to "dismiss [a qui tam] action . . . based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982 ed.). The Ninth Circuit accepted, and respondent does not dispute, that because "the government was aware of [respondent's] allegations before he filed his suit, the [1982 provision] would bar his claim," were it applicable. 63 F.3d, at 1517.
>
> **Congress amended the FCA in 1986, however, to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information. See**

> **31 U.S.C. § 3730(e)(4)(A). Because the 1986 amendment became effective before this suit was commenced, respondent contends that it, rather than the 1982 qui tam provision, controls. We disagree.**
>
> 520 U.S. at 945-46, 117 S.Ct. at 1875-76.

In *Hughes Aircraft*, the fact that the government already possessed the information was an important fact, but it was important not because of any issues under the 1986 law – the law that is still in effect today – but rather, because under the *old* law, it would bar the relator's *qui tam* action. By quoting only the text in bold above, from the second paragraph of the two paragraphs above, Petitioner makes it look as though the government's possession of information is a significant element under the 1986 law, when in fact, it is not. Given the fact that there was no dispute that the government possessed information concerning the fraud before the action was commenced, the second paragraph merely states that this was no longer a disqualifying fact under the 1986 amendment, if it applied.

Further, in *Hughes Aircraft*, the court was not asked to consider a situation in which the government allegedly did not already possess the information about the alleged fraud at the time the action was commenced. Thus, *Hughes Aircraft* cannot be read as making any distinctions under the 1986 law between cases where the government already has the information when the *qui tam* action is first filed and cases where it does not. It stands only for the proposition that, under the old law, government possession of the information bars the *qui tam* suit, whereas

under the 1986 law, government possession of the information does not bar the *qui tam* suit.

In fact, the Court had no occasion to construe the new "public disclosure" provision, other than to hold that it removed a defense which had existed under the prior statute, namely, possession of the information by the government prior to suit, 520 U.S. at 948, 117 S.Ct. at 1877. The Court did not hold that government possession of information concerning the fraud was a requirement for the new "public disclosure" bar to apply.

C. No Authority Supports Petitioner's Construction Of The FCA

Rather than presenting this Court with evidence of a split of authority in the lower courts concerning its position, Petitioner cites to no authority for its argument that the FCA requires the federal government to possess knowledge of the alleged fraud before the "public disclosure" bar applies.

In fact, several courts of appeal have interpreted the 1986 amendment as replacing the focus on federal government knowledge of alleged frauds with the defined public disclosure framework. *United States ex rel. Williams v. NEC Corporation*, 931 F.2d 1493, 1497-98 (11th Cir. 1991); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 813 (9th Cir. 1995); *United States ex rel. Doe v. John Doe Corporation*, 960 F.2d 318, 321-22 (2nd Cir. 1992); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 (1st Cir. 1990), *cert. denied*, 499 U.S. 921, 111 S.Ct. 1312 (1991).

Further, several post-1986 cases have interpreted the jurisdictional bar as coming into play when the public disclosure occurs in the context of **state** court proceedings. In these cases, there was no evidence that the federal government had the information in its possession when the *qui tam* action was filed. *See United States v. Northrop Corp.*, 59 F.3d 953, 967 (9th Cir. 1995) ("By filing his wrongful termination suit in state court, Green 'publicly disclosed' the allegation of fraud . . . "); *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1340-41, 1350-51 (4th Cir. 1994), *cert. denied*, 513 U.S. 928, 130 L.Ed.2d 278, 115 S.Ct. 316 (1994); *United States ex rel. Stinson v. Prudential Insurance*, 944 F.2d 1149, 1147-60 (3rd Cir. 1991).

Finally, public disclosure in "the news media" bars a *qui tam* action under the statute. There is no requirement that the media learn of the fraud from the federal government. This is perhaps the best example that under the 1986 amendment, the focus is on the fact that the "allegations or transactions" giving rise to the claim have already been aired in some "public" forum, rather than on determining exactly when some element of the federal government first learned of them.

This Court should deny the Petition as to the first question presented because there is no support for Petitioner's construction of the statute, no conflict in the lower courts concerning Petitioner's construction and because Petitioner has argued, abandoned and then resurrected this argument as it has suited Petitioner's purposes in this protracted litigation.

II. PETITIONER'S SECOND ARGUMENT WOULD DEPRIVE QUI TAM DEFENDANTS OF ANY OPPORTUNITY TO CHALLENGE THE SUBJECT MATTER JURISDICTION OF THE TRIAL COURT

A relator commences a *qui tam* action by filing a complaint, under seal, and serving the complaint and "written disclosure of substantially all material evidence and information the person possesses" upon the government, 31 U.S.C. § 3730(b)(2). The government then has at least 60 days to review the case, *in camera*, to decide whether to intervene, *Id.*

The government has the option to proceed with the action, assuming primary responsibility for the conduct of the case, or to decline to take control of the action and allow the relator to proceed with the case, § 3730(b)(4). During this period of time, the defendant has not yet been served with the action and is not served until the trial court orders service to be effectuated, § 3730(b)(2) and (b)(3).

The petitioner argues that only the government can raise the "public disclosure" bar provision of the FCA, § 3730(e)(4)(A), and only during this *in camera* period. In petitioner's phrase "once the government declines to dismiss the case, public disclosure litigation is over." *See*, Petition, at p. 22, argument heading IV. There are several problems with this argument.

A. Petitioner Did Not Present This Argument To The Courts Below

Petitioner did not make this argument in the court's below. As a general rule, this Court does not consider issues unless they have been presented to the lower courts for decision. The failure to raise an issue in the court below, absent extraordinary circumstances, precludes its consideration on appeal. *Sisson v. Ruby*, 497 U.S. 358, 359 fn. 1, 111 L.Ed.2d 292, 297-98 fn. 1, 110 S.Ct. 2892 (1990); *Yee v. Escondido*, 503 U.S. 519, 532-33, 118 L.Ed.2d 153, 168-69, 112 S.Ct. 1522 (1992). A-1 Ambulance should be aware of this principle, having benefited from it previously. *A-1 Ambulance Service, Inc. v. County of Monterey*, 90 F.3d 333, 338-39 (9th Cir. 1996).

B. Petitioner's Argument On This Point Is Incomprehensible.

A-1 sets forth its argument on this point in Section IV of its brief (Petition for Writ, page 22-23). A-1's argument here is simply incomprehensible. Under Supreme Court Rule 14, "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is a sufficient reason for the Court to deny a petition." Rule 14 should be invoked here as to this argument.

C. A-1's Position Does Not Make Any Sense Given The Statutory Scheme At Issue

A-1 asserts, in heading IV (Petition for Writ, page 22), that "once the government declines to dismiss the case, public disclosure litigation is over." This position does not make any sense in practice, in light of the statutory framework in which the public disclosure bar is found.

Under 31 U.S.C. § 3730(b), a private party (the "relator") may bring a *qui tam* action in the name of the government to seek redress for certain wrongs against the government. The complaint in such an action is initially sealed for a limited period of time, to enable the government to investigate the matter. Under Section 3730(b)(4) and (c), the government then has the option of taking over the case, intervening in the case, settling the case, dismissing the case, or allowing the private party to proceed with the case without the government's participation.

Under Section 3730(c)(2)(A), the government may dismiss the case for any reason that it deems appropriate. The government does not need to rely on any jurisdictional bar in order to dismiss the case. Indeed, under Section 3730(e)(4)(A), the public disclosure bar does not apply to actions brought by the Attorney General on behalf of the government. Moreover, the relator who brings the action is not going to assert the public disclosure bar, because that would result in the dismissal of his own action. Thus, the only party to such a *qui tam* action who would conceivably assert the public disclosure bar in order to get the case dismissed is the **defendant**. A-1's position is that the public disclosure bar

is no longer available to the defendant, once the government decides not to dismiss the case. This makes no sense whatsoever, since it takes away from the defendant the ability to rely on this defense that has been given to the defendant by statute.

Furthermore, the government can decide to dismiss the case at any time – either early on during the case, or after the case has been pending for several years, or any time in between. Thus, as long as the case is pending, it must be true that the government has declined to dismiss the case. Thus, according to A-1, as long as the case is pending, the defendant cannot raise the public disclosure bar because the government has declined to dismiss the case. Again, A-1's position makes no sense whatsoever.

D. Petitioner's Construction Would Violate Long Standing Federal Judicial Practice And Would Raise Constitutional Problems For This Provision

1. A Party Can Always Challenge Subject Matter Jurisdiction

Petitioner fails to consider that the "public disclosure" bar of Section 3730(e)(4)(A) is a jurisdictional requirement for a *qui tam* action. The section begins "No court *shall have jurisdiction* over an action under this section based upon the public disclosure of allegations or transactions . . . " (*Id. Emphasis added*).

The subject matter jurisdiction of a court can always be challenged, at any time, either by the parties or by the court itself and cannot be conferred by consent of the parties, *City of Gainesville v. Brown-Crummer Inv. Co.*, 277

U.S. 54, 59, 48 S.Ct. 454, 456 (1928); *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934). Petitioner's argument would abrogate this long established federal judicial principle.

2. Petitioner's Argument Would Deprive Defendants of a Defense Without Due Process

This Court attempts to construe statutes to avoid constitutional infirmities, *Cheek v. United States*, 498 U.S. 192, 203, 111 S.Ct. 604, 611 (1991). As described above, nothing in Section 3730(e)(4)(A) or federal case law supports Petitioner's reading of this provision.

However, were Petitioner's construction to be applied, then defendants would never have a chance to argue that the court hearing their case lacked jurisdiction to do so. Under the statutory scheme, the defendant is unaware of the action while it is under seal and is not served with the complaint until the government decides whether to assume control of the case. Under Petitioner's reading of the provision, by the time the defendant is served with the complaint it is already too late to challenge jurisdiction unless the government has already done so.

This would create obvious due process difficulties with the statute. *See, e.g. American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102 (1932) ("Due process requires that there be an opportunity to present every available defense").

III. THIS PETITION COULD BE AFFECTED BY THE DECISION IN *VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES EX REL. STEVENS*, NO. 98-1828

On November 19, 1999, the Court asked the parties in the *Vermont* case to brief the issue of whether a private person relator has Article III standing to pursue a *qui tam* action, at least where the government declines to take control of the case.

If this Court were to hold in *Vermont* that a private relator lacks Article III standing to pursue a *qui tam* action where the government declines to assume control of the case, that would be a separate, and independent basis why review in this case would not be necessary.

CONCLUSION

A-1 Ambulance has been challenging Monterey County's actions regarding emergency medical care for many years. This particular challenge has reached all the way to this Court, but there are no significant federal issues presented which would justify review by this court.

Respectfully submitted,

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